Supreme Court, U.S.
FILED
NOV 19 1993
OFFICE OF THE CLERK

No. 93-641

In The

Supreme Court of the United States

October Term, 1993

KATHY FLEMING,

Petitioner,

vs.

BORDEN, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 11

ARGUMENT 14

I. THE PETITION SEEKS TO RAISE AN ISSUE NOT ADVANCED IN THE COURTS BELOW 14

II. THE COURTS OF APPEAL ARE UNANIMOUS IN APPLYING A SPECIFIC INTENT REQUIREMENT TO SECTION 1140 15

III. THE REQUIREMENT OF SPECIFIC INTENT TO VIOLATE THE FIRST CLAUSE OF SECTION 1140 IS SUPPORTED BY THE STATUTORY LANGUAGE AND DECISIONS OF THE COURTS OF APPEAL 17

IV. THE FOURTH CIRCUIT DID NOT REQUIRE PETITIONER TO PROVE ENTITLEMENT TO A BENEFIT AS AN ESSENTIAL ELEMENT OF HER CLAIM 19

V. BORDEN'S ATTENDANCE POLICY IS NOT INHERENTLY DISCRIMINATORY 21

VI. SECTION 1132 PROVIDES FOR INJUNCTIVE RELIEF WHERE A VIOLATION OF SECTION 1140 IS ESTABLISHED 23

TABLE OF CONTENTS – Continued

Page

VII. THE DEFINITION OF TOTAL DISABILITY IN THE PLAN WAS NOT MATERIAL TO DECISION IN THIS CASE..... 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Conkwright v. Westinghouse Electric Corp., 933 F.2d 231 (4th Cir. 1991) 16, 17

Dister v. Continental Group, Inc., 859 F.2d 1108 (2d Cir. 1988) 16, 18

Dytrt v. Mountain State Telephone and Telegraph Company, 921 F.2d 889 (9th Cir. 1990) 18

Gavalik v. Continental Can Co., 812 F.2d 834 (1987), *cert. denied*, 484 U.S. 979 (1988) 16, 21, 22, 23

Humphreys v. Bellaire Corp., 966 F.2d 1037 (6th Cir. 1991) 16

Kimbro v. Atlantic Richfield, Inc., 889 F.2d 869 (9th Cir. 1989) 16, 18

Olitsky v. Spencer Gifts, Inc., 964 F.2d 1471 (5th Cir. 1992) 16

Owens v. Storehouse, Inc., 984 F.2d 394 (11th Cir. 1993) 16, 18

Rath v. Selection Research, Inc., 978 F.2d 1087 (8th Cir. 1992) 16

Rush v. McDonald's Corp., 966 F.2d 1104 (7th Cir. 1992) 16

Woolsey v. Marion Laboratories, Inc., 934 F.2d 1452 (10th Cir. 1991) 16

STATUTES

29 U.S.C. Section 1132 ..... 1, 4, 23, 24

29 U.S.C. Section 1140 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

62 Notre Dame Law Review 1024 (1987) 22

The American Heritage Dictionary of the English Language (1981) 17

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Respondent, Borden, Inc. by and through its undersigned attorney, respectfully requests that petitioner's request for writ of certiorari to the Fourth Circuit Court of Appeals be denied.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

29 U.S.C. Section 1132(a) "Persons empowered to bring a civil action" provides:

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USC Section 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USC Section 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (1).

29 U.S.C. Section 1140 "Interference with Protected Rights" provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 USC Section 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 USC Section 1132] shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

PRIOR PROCEEDINGS

Pursuant to Supreme Court Rules 15.1 and 24.2, respondent Borden, Inc. (hereafter "Borden") offers its own statement of the case.[1] Petitioner sued Borden following her discharge, and alleged, among other causes of

[1] Pursuant to Supreme Court Rule 29.1, Borden discloses that it is a general partner in BCP Limited Partnership (NYSE). There are no other parent or subsidiary corporations except for wholly owned subsidiaries.

action, a cause of action for violation of the anti-discrimination provisions of Section 510 of the Employee Retirement Income Security Act (ERISA), codified at 29 U.S.C. Section 1140. Specifically, petitioner alleged that she had been discriminated against for her exercise of rights under Borden's disability plan, a welfare benefit plan regulated by ERISA, and for the purpose of interfering with the attainment of rights under the disability plan to which she might have become entitled in the future. [Jt. App. 28, para. 63] Petitioner additionally alleged that her legal rights under these plans terminated at the time her employment ended. [Jt. App. 28-29, para. 64] Petitioner requested as relief for the alleged violation of Section 1140 all the remedies available under 29 U.S.C. Section 1132, the civil enforcement section of ERISA. Section 1132 allows injunctive and other equitable relief as well as legal relief.

The District Court granted summary judgment on petitioner's Section 1140 claim, holding that petitioner had presented "no evidence which would tend to prove a causal connection between her discharge and her membership in the disability plan. . . . " [Petition App. at 16] Petitioner had argued that the perception at Borden was that she was or soon would be eligible for long-term disability benefits, and she was discharged to prevent her from successfully carrying through with a claim. [Petition at 5] The court found, however, that she could not even create an issue of fact as to whether she was progressing toward eligibility under the long-term disability plan (which required a waiting period of six months of disability), since she presented no medical testimony either that she was "totally disabled," or that she was "unable to

perform the essential functions of her job." The court additionally held that even had she been able to establish growing eligibility for disability benefits, she would have to show that Borden was "aware and concerned about her growing eligibility. . . . " This she was unable to do. [Petition App. at 10-13]

On appeal to the Fourth Circuit, the panel adopted the District Court's reasoning in its decision filed June 28, 1993. [Petition App. at 1] Petitioner moved for rehearing, which was denied by the Court of Appeals on July 23, 1993. Petitioner filed this petition with the Clerk of the Supreme Court on October 21, 1993, and it was received by Borden's counsel on October 22, 1993.

STATEMENT OF FACTS

Petitioner's statement of facts is argumentative, and many of her statements are not supported by the record. Therefore, Borden details the undisputed material facts below. Borden then rebuts petitioner's arguments and misstatements in a separate argument.

Petitioner was hired by Borden in 1981. Near the time of her hire, she was given a plant rules booklet, which provided in its rule on absences that excessive absences for any reason could subject an employee to termination. [Jt. App. at 359] In practice, Borden management used the average absenteeism rate for the plant as a rule of thumb to define excessive absenteeism. Whenever an employee's absence rate began to exceed 1.5 to 2.0%, they would be counseled. If their attendance failed to improve after repeated counseling, they could be discharged. [Jt. App. at 555] Medical leaves of absence, along with other

absences such as bereavement leave, military leave, and jury duty, were not counted towards excessive absenteeism. [Jt. App. at 341]

In 1985, petitioner was on a medical leave of absence in January and February due to an operation on her thumb. She returned to work on February 28, 1985. While on leave of absence, she drew short-term disability benefits through Borden's disability plan. She had previously drawn short-term disability benefits for other non-work-related medical problems. After returning to work, she experienced attendance problems. On June 29, 1985, she was issued a written warning on her attendance, which indicated that she had 18 absences in addition to 50 days' medical leave. She was informed these absences were excessive and she needed to bring them under control. [Jt. App. at 349]

She requested and was granted another medical leave of absence on July 9, 1985, due to a problem with headaches. She drew short-term disability benefits for this condition as well. She returned to work on November 18, 1985. [Jt. App. at 346] On December 21, 1985, she was issued a second written warning concerning her attendance. Since returning from her leave (a period of 24 working days) she had missed two days and gone home sick once. She again was informed that she needed to improve her attendance. [Jt. App. at 350] She left work early the night she received this warning. [Jt. App. at 346]

On January 30, 1986, petitioner suffered an on-the-job injury to her wrist. [Jt. App. at 87] She was released for light duty shortly after this injury. [Jt. App. at 208] She returned to work, but her attendance did not improve.

On March 11, 1986, she was given another written warning on attendance. While five days out with her wrist injury were not counted against her, she had six absences not related to her injury. This communication informed her that failure to improve her attendance would result in termination. [Jt. App. at 352] While petitioner's attendance improved slightly right after the reprimand, she soon developed another attendance problem.

While she had been released for light duty shortly following her wrist injury, in April of 1986 she began to leave work early almost every night complaining of pain. Even though she was seen by no less than five physicians for her wrist injury, none of them ever opined that she was disabled by her condition. [Jt. App. at 368-73] No doctor ever issued an opinion that she could not work light duty. [Jt. App. at 338, 342] Even after she began to leave work early consistently, working only an hour or two each night, her doctors' opinions about her ability to work light duty did not change.

On June 12, 1986, petitioner was given her fourth written warning on attendance. This warning recited that she had developed a pattern of leaving early even though the doctors were saying that she could work light duty. At this point, she had 41 unexcused absences. [Jt. App. at 355] On June 23, 1986, she was released to return to normal activity with her wrist by the orthopaedic expert treating her, Dr. Daggett Royals. [Jt. App. at 366] Petitioner worked only one hour the night she was informed of Dr. Royals' opinion. She missed the next night completely. She was discharged when she next returned to work. [Jt. App. at 347]

Petitioner would not have been eligible to draw short-term disability benefits under Borden's plan for her wrist injury, due to the fact that it was an on-the-job injury. [Jt. App. at 380] She could have received a medical leave of absence had a doctor certified she was unable to work. This, of course, never occurred.

REBUTTAL OF PETITIONER'S FACTUAL ARGUMENT

Petitioner is confused regarding the standard for a medical leave of absence. Petitioner, on page 10 of her petition, equates any absence which has a doctor's excuse as a leave of absence. However, Borden's attendance policy counts absences for any reason towards excessive absences. Medical leaves of absence are excluded, but must be applied for, approved, and supported by medical opinion of a disability from working for a significant period of time. This program is designed to allow time to take care of serious medical problems, not designed for day-to-day sickness.

Petitioner also claims that her 18 absences in 1985 were related to a condition (headaches) for which she later took a leave of absence, and thus should not count against her. Even if this is true, it is difficult to see how it aids any of petitioner's legal arguments. One should never reach that point of analysis, however, for there is no opinion in the record either that these absences were related to headaches or that any headaches disabled petitioner from working prior to the beginning of her leave on July 9, 1985. Prior to her medical leave, she was seen on most of these 18 absences by her family physician, Dr.

Bannon. No indication of headaches appears on Dr. Bannon's notes until June 28, 1985. Rather, they indicate such things as vertigo, depression, hypoglycemia, and sore throat. The note on June 28 does not indicate she is disabled by headaches. The other notes relating to headaches appear after her leave of absence began. [Jt. App. at 152-54] Petitioner also mentions doctor's visits on August 14 and September 17, 1985, but of course, these visits were within her leave of absence and were not counted against her. [Petition at 11-12]

Petitioner next contends that absences following her leave of absence were also related to her migraines, that these absences were counted against her, and that she was not granted short-term disability benefits for these absences. Borden's short-term disability plan does provide that recurrence within 90 days of a condition for which short-term benefits were received can result in eligibility for further benefits. There are two problems with petitioner's assertion: (1) she never applied for benefits for the alleged recurrences; and (2) there is no evidence in the record that any medical conditions arising within 90 days after the end of her short-term disability on November 18, 1985, were in fact due to further migraine problems.

Petitioner mentions several dates, December 30, 1985, January 17, February 26, March 16, and April 29-30, 1986. Petitioner was seen by Dr. D. W. Nicholson on December 30, 1985, but for a problem with pain, decreased and double vision in her left eye of *unknown etiology*. [Jt. App. at 174-75] On January 17, 1986, petitioner had a CT scan performed at Dr. Nicholson's request for her vision problem. [Jt. App. at 174] Again, there is no connection to

headaches. There is no record of a doctor's visit on February 26, 1986, nor is there a record of a doctor's visit on March 16, 1986. There was a visit on March 26, 1986, as well as April 29 and 30, 1986, to Dr. Carol Nichols for headaches. That these visits were for headaches, however, is documented in the record only by a supervisor's note. [Jt. App. at 258] Nothing indicates any disability. Nor were these last visits within 90 days of November 18, 1985.

Petitioner admits that even after her wrist injury, she missed days from work that were not due to either her migraines or her arm injury. She missed three days, February 13, 14, and 15, with the flu [Petition at 21], and missed March 6, 7, and 8 with a stomach problem. [Petition at 22-23] Given her already dismal attendance record during 1985, it is a small wonder she was given another written warning for these six work days missed within a span of 30 calendar days. [Jt. App. at 347]

Finally, petitioner claims she was constructively terminated. [Petition at 28] Petitioner never raised an issue of constructive termination in the courts below. Her theory of constructive termination appears to be that she was given dangerous, painful work to do that violated her doctors' restrictions. [Petition at 29] This is difficult to understand, however, when on the next page petitioner maintains her fellow workers resented her because of her light duty assignments. [Petition at 30] Petitioner argues that after April, Borden in effect cut her off from obtaining any more physicians' statements which would have further restricted her work assignments. [Petition at 36] This is simply not true. She was seen on May 5, 1986, by Dr. McClure and on May 19, 28, and June 18, 1986, by Dr.

Royals. At no time did either doctor recommend additional work restrictions. [Jt. App. at 260, 267-69, 277] During this time period, petitioner worked a total of 40.9 hours in 35 scheduled days of work. [Jt. App. at 347] These visits to physicians, rather than resulting in additional restrictions, resulted in Dr. Royals' advice on June 18, 1986, that she "return to normal activity with her wrist." [Jt. App. at 277]

SUMMARY OF ARGUMENT

The petition seeks to raise an issue concerning the required intent necessary to violate Section 1140. The petition fails to properly raise this issue. Even if this issue is properly raised, the petition provides no reason for the Court to grant certiorari. The Courts of Appeal to have considered the issue are unanimous in requiring specific intent as an essential element for a violation of Section 1140. The requirement of specific intent is a well settled question of law. The requirement of specific intent imposed by the Courts of Appeal is faithful to the statutory language which prohibits only actions taken *because* of the exercise of a right protected by ERISA. To imply, as does petitioner, that this Court should establish a cause of action for negligent or reckless discrimination is absurd.

Both the District Court and the Court of Appeals viewed this case as arising under the second clause of 29 U.S.C. Section 1140 since petitioner was discharged prior to becoming eligible for long-term disability benefits. The

second clause specifically relates to purposeful interference with the attainment of a right, rather than discrimination for exercising a right. The petition raises no question regarding the requirement of intent for this second clause. The petition does raise a question regarding the requirement of intent with respect to the first clause, which prohibits discrimination for exercise of rights under a plan. Since neither court below considered this case under the first clause, however, the question as to whether specific intent is required under the first clause raised by the petition is not properly before this Court.

The Court of Appeals did not require petitioner to prove entitlement to a future benefit as an essential element of her claim, as she asserts. Rather, it is clear that both the District Court and Court of Appeals looked at her eligibility for long-term disability only because of her assertion that it provided a causal connection between her membership in the plan and her discharge. Both determined that a causal connection could not possibly be shown by this evidence because it failed even to raise a factual issue as to her growing eligibility under the plan. The District Court commented:

> Moreover, even had she presented medical evidence of disability, in order to supply the required causal connection, she would have to show that defendant was aware of and concerned about her growing eligibility for long-term disability. She has provided no evidence from which this Court could conclude defendant even considered the question of whether she was proceeding toward eligibility.

[Petition, App. at 13] The Fourth Circuit adopted this reasoning. [Petition, App. at 3]

The attendance policy administered by Borden does not supply direct evidence of discrimination in violation of Section 1140 because it is not inherently discriminatory. Its provisions for not counting medical leaves of absence and short-term disability against attendance records allows for recuperation from serious medical conditions. The policy does not single out potential disabled persons before they can qualify for these benefits. In fact, Borden had been dealing with petitioner's attendance problems for at least 18 months prior to her discharge. The fact that the policy includes absences due to sickness does not make it inherently discriminatory. Borden must have sufficient attendance to operate the plant efficiently, regardless of the cause of the attendance problem.

Petitioner simply failed to raise any genuine issues of material fact as to whether Borden, in discharging her, was motivated by her participation in its disability plans. The definition of disability in the plan was not a material fact on the issue of motivation due to the fact she did not comply with the undisputed requirement of providing medical evidence of disability. This narrow holding should not be disturbed by the Court.

This case does not present any major policy issues under ERISA, or even call for clarification of legal principles used in the enforcement of ERISA discrimination provisions. Rather, it presents only a question of the failure of petitioner to present proof sufficient to support her claims. The District and Appellate Courts dutifully searched the record for such proof and found

none. There is no reason for this Court to duplicate those tasks.

ARGUMENT

I. THE PETITION SEEKS TO RAISE AN ISSUE NOT ADVANCED IN THE COURTS BELOW.

Petitioner's first argument asserts that the Fourth Circuit required her to prove specific intent to discriminate in violation of Section 1140. She claims that the first clause of Section 1140 cannot be read to support such a requirement, and that a requirement of intent is only applicable to the second clause. The first clause of Section 1140 makes it unlawful to discharge or otherwise discriminate against a participant in a benefits plan *for* exercising any rights to which they are entitled under the plan. The second clause prohibits discharge or discrimination for the purpose of interfering with the *attainment* of any right to which a participant may become entitled. 29 U.S.C. Section 1140 (1986).

Petitioner's argument is not properly before this Court since the case in both the District Court and the Court of Appeals was prosecuted under the second clause of Section 1140. The District Court found "plaintiff contends that the true reason for her discharge was to get rid of her before she qualified for long-term disability under the defendant's plan." [Petition, App. at 9] The Court of Appeals concurred, and cited only the second clause of Section 1140 in rendering its opinion and decision. [Petition, App. at 3] Petitioner's amended complaint alleges intentional action:

> Defendant's reason for the adverse employment actions it took against plaintiff were to interfere with Plaintiff's existing or future rights under the Plans or such were at least a substantial or motivating factor behind defendant's actions . . .

[Jt. App. at 29, para. 65] She was not eligible for long-term disability as of the date of her termination. [Jt. App. at 343; Petition at 5] Regardless of whether one considers either occupational or non-occupational causes, petitioner failed to satisfy either the medical requirements or waiting period for long-term disability. [Petition at 16-17, 37] Therefore, her action can only be seen as one of interference with future attainment of benefits. Petitioner agrees that specific intent applies in such a case. [Petition at 40-41] Since her case was not decided by either lower court on the basis of the first clause of Section 1140, she cannot properly raise the issue of whether intent is required in the first clause.

II. THE COURTS OF APPEAL ARE UNANIMOUS IN APPLYING A SPECIFIC INTENT REQUIREMENT TO SECTION 1140.

The Fourth Circuit's holding that petitioner must show a specific intent to interfere with her attainment of benefits was proper. This issue has now been considered by all circuits except the First Circuit Court of Appeals and the Federal Circuit Court of Appeals. The circuits who have considered the question have been unanimous in requiring specific intent to violate Section 1140:

> Section [1140] was designed primarily to prevent 'unscrupulous employers from discharging

> or harassing their employees in order to keep them from obtaining vested pension rights. An essential element of plaintiff's proof under the statute is to show that an employer was at least in part motivated by the specific intent to engage in activity prohibited by [Section 1140].
>
> On the other hand, '[n]o ERISA cause of action lies where the loss of pension benefits was a mere consequence of, but not a motivating factor behind, a termination of employment.'

Dister v. Continental Group, Inc., 859 F.2d 1108, 1111 (2d Cir. 1988); *Accord, Gavalik v. Continental Can Co.*, 812 F.2d 834, 851-52 (1987), *cert. denied*, 484 U.S. 979 (1988); *Conkwright v. Westinghouse Electric Corp.*, 933 F.2d 231, 238-39 (4th Cir. 1991); *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1478-79 (5th Cir. 1992); *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1991); *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1120-21 (7th Cir. 1992); *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1089 (8th Cir. 1992); *Kimbro v. Atlantic Richfield, Inc.*, 889 F.2d 869, 881 (9th Cir. 1989); *Woolsey v. Marion Laboratories, Inc.*, 934 F.2d 1452, 1461 (10th Cir. 1991); *Owens v. Storehouse, Inc.*, 984 F.2d 394, 399 (11th Cir. 1993).

A review of these cases reveals that it is a well settled conclusion among the Courts of Appeal that specific intent is required for a violation of Section 1140. This conclusion is supported by the statutory language, and there is no need for this Court to either correct or clarify the law in this area.

III. THE REQUIREMENT OF SPECIFIC INTENT TO VIOLATE THE FIRST CLAUSE OF SECTION 1140 IS SUPPORTED BY THE STATUTORY LANGUAGE AND DECISIONS OF THE COURTS OF APPEAL.

Petitioner's assertion is that the first clause of Section 1140 can be violated without specific intent, by reckless or negligent actions. Borden has argued that this issue is not properly raised since the decisions below correctly considered her claims only under the second clause of Section 1140. Even if properly raised, however, the correct interpretation of the first clause under Section 1140 should be no different than that of the second clause; both require a specific intent.

Petitioner provides no legal authority for her contention. That is because there is none. Her argument would seem to rest upon the conclusion that the statute uses language requiring scienter only in the second clause where the language " . . . or for the purpose . . . " appears. This ignores the fact that the first clause uses "for" in the conjunctive sense to link the prohibited conduct of discharge, discipline, or discrimination to the exercise of a right to which a participant is entitled under the ERISA plan. In this sense, "for" means that the prohibited conduct occurred "because" of the exercise of a right. *The American Heritage Dictionary of the English Language* (1981). Petitioner's argument would seem to suggest that the only requirement be that the conduct cause an interference with the benefits. Clearly, this is not supported either by the above-quoted statutory language or the case law. In *Conkwright v. Westinghouse Electric Corp.*, 933 F.2d 231 (4th Cir. 1991), the Fourth Circuit held that actions by

an employer to save benefit costs were insufficient standing alone to prove intent to discriminate. *Id.* at 239. Likewise, no action lies where the loss of benefits is a mere consequence of termination of employment. *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988). Under petitioner's rationale, any action by an employer which resulted in an adverse effect on a benefit could be actionable. Every participant in a benefit plan would be guaranteed the highest possible benefit, regardless of the motivation behind an employer's actions affecting benefits.

The only two Circuit Courts of Appeal to consider this precise question have explicitly included the first clause of Section 1140 in their holdings requiring specific intent. In *Owens v. Storehouse, Inc.*, 984 F.2d 394, 398 (11th Cir. 1993), the Eleventh Circuit Court of Appeals considered a case where an amendment to a health plan limiting benefits for AIDS was alleged as a violation of Section 1140. The court held Section 1140 does not broadly forbid all forms of discrimination. Rather, it is aimed at discrimination designed as retaliation for exercise of a right or to interfere with attainment of a future right. *Id.* To the same effect are the holdings of the Ninth Circuit in *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 881 (9th Cir. 1989), and *Dytrt v. Mountain State Telephone and Telegraph Company*, 921 F.2d 889, 896 (9th Cir. 1990).

Petitioner's argument, although novel, fits neither within the language of the statute nor its limited purpose. As such, it does not merit the attention of this Court.

IV. THE FOURTH CIRCUIT DID NOT REQUIRE PETITIONER TO PROVE ENTITLEMENT TO A BENEFIT AS AN ESSENTIAL ELEMENT OF HER CLAIM.

Borden agrees with petitioner's assertion that she should not have to show entitlement to benefits as an essential element of her claim for discrimination under Section 1140. The weaknesses with petitioner's argument are that: (1) neither court below required her to establish such an entitlement; and (2) both courts found that she had no evidence tending to prove an illegal motivation on Borden's part.

Petitioner never identifies the precise holding of either court with which she disagrees. Both courts did find that she could not establish her eligibility for long-term disability due to the absence of medical evidence. [Petitioner, App. at 3, 12] The courts below, however, were considering this question because petitioner was maintaining that the fact she was discharged *just before* she completed the six-month waiting period for disability supplied the required causal connection between her discharge and her membership in an ERISA benefit plan:

> Plaintiff argues that she was well on her way to qualifying for long-term disability when she was discharged, and this supplies the necessary causal connection.

[Petition, App. at 10] Since both courts held that her evidence did not tend to prove the waiting period had begun, this evidence could not supply a causal connection. Both courts then proceeded to consider other

evidence which petitioner argued supplied the requisite causal connection.

The linchpin of the decision of both courts was the lack of any evidence to supply the requisite causal connection. The District Court concluded:

> Moreover, even had she presented medical evidence of disability, in order to supply the required causal connection, *she would have to show that defendant was aware of and concerned about her growing eligibility for long-term disability. She has provided no evidence from which this Court could conclude defendant even considered the question of whether she was proceeding toward eligibility.*

[Petition, App. at 13] [Emphasis added]

The Fourth Circuit Court of Appeals concurred:

> While Fleming claimed to have been nearing the twenty-seven week disability threshold required for eligibility for long-term benefits at the time she was terminated, the district court noted that she never actually established, through medical opinion or otherwise, that she was in fact disabled at any time between her injury on January 30, 1986, and her dismissal five months later. *Thus, far from approaching eligibility for long term benefits, Fleming had not even satisfied the prerequisite necessary to start the disability clock running. Moreover, the district court concluded that there was no evidence that the supervisors who hired Fleming had ever even considered the possibility that she might be proceeding toward eligibility for long-term disability benefits at the time they discharged her.*

> . . . [A]greeing that appellant failed to establish her disability through medical opinion during the relevant time period, or to provide any evidence of a causal link . . . we affirm. . . .

[Petition, App. at 3-4] [Emphasis added] Since petitioner has misread the actual holding of the Fourth Circuit, no issue is raised by the petition requiring the attention of the Supreme Court.

V. BORDEN'S ATTENDANCE POLICY IS NOT INHERENTLY DISCRIMINATORY.

Petitioner argues that she raised a genuine issue of material fact concerning direct evidence of discrimination by proof of Borden's attendance policy. Petitioner contends that the policy inherently discriminates against employees with disabilities because it results in termination of employees who exceed the plant average for absences without considering any connection between absences and an employee's disability. Petitioner cites *Gavalik v. Continental Can Company*, 812 F.2d 834 (3rd Cir. 1987) in support of this proposition. The facts concerning the attendance policy are not in dispute. No reasonable inference of discrimination can arise from these facts. Petitioner has presented no evidence that this policy was enacted with a motive to discriminate, such as was shown in the *Gavalik* case. *Id.* at 857.

Absences under the policy due to short-term health or other problems (such as transportation failures) count toward excessive absenteeism. Mechanisms are in place to deal with longer term health problems outside of the attendance policy (medical leaves of absence and/or

short term disability payments). Therefore, it cannot be said that the policy itself is used for screening and eliminating those who might have the potential for qualifying for long-term disability. Nor is there any evidence of arbitrary application of the policy.

The Law Review article cited by petitioner, rather than supporting her argument, recognizes that attendance policies which provide for consideration of long-term absences are not inherently discriminatory:

> Here the employer would argue that the intention is not deprivation of benefits but deterrence of excess absenteeism, a legitimate concern. Yet there are ways of promoting that interest – such as by requiring a doctor's certificate or a physical exam so that the medical condition is genuine – that do not deprive employees of benefits when they need them.

62 Notre Dame Law Review 1024, 1041 (1987).

If petitioner was nearing disability, why didn't she apply for a medical leave? If she was already disabled, why didn't she apply for short-term disability benefits? Such action would have removed her from operation of the attendance policy and saved her job. She had utilized both medical leave and disability in the past; why didn't she this time? The answer is clear – she was not disabled and she could not convince a doctor she should not have been working.

Petitioner's citation to the *Gavalik* case is not applicable. In *Gavalik*, a computer program called the Bell System was designed to identify unfunded pension liabilities and avoid triggering future vesting of these liabilities by

retaining employees whose pensions had vested, while placing on layoff those with unvested pensions. The latter employees were red-flagged to prevent recalls which might trigger additional vesting. *Gavalik*, 812 F.2d at 840-41. There was no other purpose served by the program other than to separate vested and unvested employees and prevent vesting in violation of Section 1140. *Id.* at 857, n. 39.

Here, Borden's attendance policy is designed to identify and correct absenteeism. Attendance is examined over the long run and counseling is plentiful. Employees are given fair opportunity to correct their problems. The methods chosen by Borden give due regard to participants in the disability benefit plan, and no one who is truly disabled need live in fear of discharge, unlike the employees who were near vesting in *Gavalik*. The law is clear that where intent is shown, recovery can be had under Section 510. But there is no evidence of an intent to establish the attendance policy in order to interfere with ERISA benefit rights. The petitioner, far from raising a significant legal issue worthy of consideration by the Supreme Court, merely suffers from a failure of proof.

VI. SECTION 1132 PROVIDES FOR INJUNCTIVE RELIEF WHERE A VIOLATION OF SECTION 1140 IS ESTABLISHED.

Petitioner's argument regarding Section 1132 is confusing. On page 52 of her petition, she claims she was fired before she met respondent's qualifications to file a claim. Therefore, she had no right to benefits under the terms of the plan. Even though she requested recovery of

benefits due her and an order determining her rights under the benefit plan in her complaint, it is clear that the substantive provisions of Section 1132 would provide relief only where a provision of the plan entitled petitioner to such relief. No relief is due for the very reason cited by petitioner: she never met the qualifications under the plan to file a claim. Borden is under no fiduciary duty to evaluate the merits of a claim which is clearly not authorized by the terms of the plan. Even assuming, as petitioner asserts, that this is akin to a contract action, and intent is not relevant, petitioner has never shown a breach of the plan. [Petition at 42]

Section 1132, however, also provides the remedies available for a violation of Section 1140. A full range of legal and equitable remedies, including injunctive relief, is available. This relief, however, was not available to petitioner in this case because she failed to make out a claim under Section 1140. No question of interpretation of Section 1132 is presented for this Court's consideration.

VII. THE DEFINITION OF TOTAL DISABILITY IN THE PLAN WAS NOT MATERIAL TO DECISION IN THIS CASE.

Petitioner argues that the difference between the language used to define "totally disabled" in the actual disability plan documents and the definition appearing in the summary plan description should have prevented the entry of summary judgment in this case. Both courts below recognized the use of different language. Neither court considered it a material fact.

In the actual plan documents, "total disability" for the purposes of this case is defined as inability to perform any and every duty of your occupation. [Jt. App. at 1363] In the summary plan description, the language used says "you are not able to perform the essential duties of your job. . . . " [Jt. App. at 391] Assuming for the purpose of argument that this language is in conflict, it is clear that the courts below did not consider this a material fact because petitioner never presented any evidence of a medical opinion that she met either definition set forth above. There was undisputed testimony that an expert medical opinion was necessary in order to qualify for disability. Lay opinions (such as the petitioner's complaints of pain) were not sufficient. [Jt. App. at 1363-66]

In response to this undisputed fact, the petitioner maintains that there is medical evidence of disability; however, she fails to cite to any evidence of record. Secondly, she states that short-term disability benefits were not available for job-related injuries. While this is true, it has no effect on decision in this case. Workers disabled by on-the-job injuries can qualify for a medical leave of absence (which removes them from operation of the attendance policy), and workers' compensation provides temporary total disability benefits. All this was dependent, however, on a physician certifying that she was unable to work, even at light duty. Unfortunately for petitioner, this never happened.

Petitioner makes two final points. First, that a person could be disabled from performing the essential duties of their job, but still be able to perform certain light duty assignments. In this case, she argues, the waiting period for long-term disability would begin to run even while

the person was still working. While this is an interesting argument, it cannot begin to apply to petitioner until she has evidence showing: (1) what the essential duties of her job were; (2) that she was medically unable to perform these essential functions; and (3) that the light duty she was requested to do did not involve any of the essential functions of her job. Petitioner simply has no such evidence. Finally, petitioner again claims that she was close to qualifying for long-term disability because of her migraines. This has been rebutted earlier in this response and will not be repeated here.

Petitioner's argument is simply a disagreement over her failure to offer sufficient evidence, and raises no important issues under ERISA requiring the attention of this Court.

CONCLUSION

The District Court in this case examined a voluminous record prior to granting summary judgment. The court's well-reasoned opinion correctly identified the essential factual elements which were missing from petitioner's claim. The court correctly applied well-settled legal principles under ERISA in reaching its conclusions. The Court of Appeals reached the same conclusions following its de novo review of the evidence. There is no issue presented by the petition which demands the involvement of the Supreme Court. As such, the petition for writ of certiorari should be denied.

November 19, 1993 Respectfully submitted,

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